course, if A. is interested in the fulfilment of the promise by B., or is in any way benefited by its performance, that would prove a sufficient consideration for his promise; of which *Scotson* v. *Pegg*, 6 H. & N. 295 (1861); is a well known instance. See also *Talman* v. *Brester*, 65 Barb. 369. *Shadwell* v. *Shadwell*, 9 C. B. N. S. 159 (1860), is rather closer. There the defendant wrote to the plaintiff, who was engaged to the defendant's niece, that he was glad to hear of his intended marriage, and that he would pay him 150*l.* a year for life. The plaintiff subsequently married, and the contract was held binding, although it did not appear that the plaintiff had by reason of the promise incurred any more liabilities than he was previously under to the defendant's niece. BYLES, J., however, dissented in a very able judgment. And see *Davenport* v. *First Cong. Society*, 33 Wis. 387. But we are drifting away from our starting point.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

United States Circuit Court, Western District of Pennsylvania.

TAYLOR ET AL. *v.* ROCKEFELLER ET AL.

A petition for the removal of a suit in equity to the United States Circuit Court, with accompanying bond, was filed in a state court during a term in which the bill was filed, but subsequently to the filing of the answer and the appointment by the latter court of a receiver. *Held*, that the petition was filed in time under the Act of Congress of 3d March 1875, requiring the filing to be made "before or at the term at which the cause could be first tried, and before the trial thereof."

No order or allowance of the state court for a removal of the cause is necessary under the Act of 3d March 1875. Under that Act, upon the filing of a proper petition and bond, in due season, the suit is withdrawn from the jurisdiction of the state court, provided the petition and record exhibit a case properly removable.

The jurisdiction of the state court is not ousted unless the petition and record show a case of which the United States court has jurisdiction; but the judgment of the state court to that effect is not binding upon the United States court; and if the latter court holds that the cause has been properly removed, a contrary decision by the state court has no effect.

Any cause which might have been commenced in the Circuit Court, either because of its subject-matter or the citizenship of the parties, may be removed from a state court into the federal one.

Quære, whether the federal courts have jurisdiction of a cause in which some of the indispensable parties on either side are citizens of the same state as that of some, but not all, of the indispensable parties on the other side.

They have not, "if the rule of construction applied to the Judiciary Act of 1789, and the Acts of 1866 and 1867, is applicable to the later Act of 3d March 1875. But the later act, for the first time, adopts the language of the constitution, and seems to have been intended to confer on the Circuit Court all the jurisdiction which, under the constitution, it was in the power of Congress to confer." Per STRONG, J.

Semble, that, upon a legitimate construction of the constitution, the federal jurisdiction in such a case exists.

Semble, that, prior to the Act of 3d March 1875, no removal could be had unless each of the plaintiffs could have sued each of the defendants in the federal court; though the ruling did not apply except as to indispensable parties, and perhaps not where distinct interests were represented by distinct parties, of whom some could sue, or were liable to be sued, in the federal courts.

But under that act the power of removal is enlarged, and may be enjoyed where in a suit there are several controversies of which one is wholly between citizens of different states, and can be fully determined as between them. And this is true though others of the same party with the petitioners for removal, actually interested in other controversies embraced in the same suit, could not, on account of having the same citizenship with some of the other party, have themselves removed the suit.

Upon the question of citizenship under the act, the court looks to the citizenship of the trustee, not of the *cestui que trust*.

Where the plaintiffs, who were all citizens of a different state from that of the defendants, trustees, in a suit against the latter, joined their *cestuis que trustent* as co-defendants, the jurisdiction of the United States court is not affected by the citizenship of any of the *cestuis que trustent*

Semble, that the "controversy" mentioned in the Act of 3d March 1875, between the petitioners and the opposite party, need not be the main controversy in the case.

A controversy wholly between citizens of different states, fully determinable as between them, entitles either of such parties to removal, though not fully determinable as between the remaining parties.

The Circuit Court, upon such removal, obtains jurisdiction over the whole cause, the remaining controversies therein being treated as incidental to that which authorized the removal.

MOTION to remand case to state court.

A bill in equity was filed in the Court of Common Pleas of Butler county, Pennsylvania, on February 8th 1878, by H. L. Taylor, John Pitcairn, Jr., and John Satterfield, against William J. Warden, Charles Lockart, William Frew, The Atlantic Refining Co., Charles Pratt, Henry P. Rogers, H. A. Pratt, John D. Rockefeller, and Henry M. Flagler, alleging that the plaintiffs, with one Vandegrift and one Foreman, sold an undivided interest in their oil-producing properties to, and entered into a partnership with, the defendants (without mentioning their names); that the object of the partnership was the purchase and operation of oil-producing territory, and the production and sale of petroleum in its crude state. It further alleged that at the time of entering into the partnership, a written contract (which was made part of the bill) was executed between certain trustees, named Taylor and Bushnell, of the first part, the plaintiffs, and Foreman and Vandegrift, of the second part, and the defendants, Flagler and Rockefeller, of the third part, stating the terms under which the title to the lands

should be purchased, held and disposed of, and fixing a method of dissolving, and limitation to, the partnership. It further alleged, that the defendants other than Rockefeller and Flagler, were parties to a conveyance of land to the trustees named in the foregoing contract; that they had assented to it in writing, and declared that their conveyance was made for the purposes set forth in it.

The contract itself showed the parties to it to be Taylor and Bushnell, trustees, parties of the first part, who were to hold the lands conveyed to them, to operate, control and sell them for the sole and exclusive benefit of Taylor, Vandegrift, Pitcairn, Foreman and Satterfield, parties of the second part, and Rockefeller and Flagler, of the third part. It stipulated that in case profits were divided, they, together with all proceeds of sale, should be divided monthly, or oftener if the executive committee should so decide, and paid one-half to Taylor, for the parties of the second part, and the other half to Flagler, for the parties of the third part. None of the defendants, other than Rockefeller and Flagler, were parties to the contract at the time of its execution.

The bill then alleged a breach of the agreement on the part of the defendants, and prayed (1) that the partnership under the agreement should be dissolved: (2) for an account and payment in accordance with it: (3) for discovery in aid of the account, and (4) for an order restraining the defendants from disposing of, or improperly interfering with, the property of the partnership, *pendente lite.*

The case was docketed to March term 1878. On February 21st 1878, an answer was filed by the defendants, denying the material allegations of the bill; on the same day the case was argued upon a motion for the appointment of a receiver, and on the 25th of February a decree was entered, appointing a receiver.

On March 5th 1878, a petition was presented and filed by Rockefeller and Flagler, two of the defendants, setting forth that they were citizens of Ohio, that of the other defendants, Warden, Lockart, Frew, and the Atlantic Refining Co., were citizens of Pennsylvania, and that the Pratts and Rogers, the other defendants, were citizens of New York. That of the complainants, Taylor was a citizen of New York, and the others of Pennsylvania; that the citizenship existed as stated, at the time of the commencement of the litigation, and continued down to the time of the filing of the petition; that the controversy was of a civil nature,

in equity, and that the sum in dispute exceeded, exclusive of costs, the sum of $500. The petition further alleged that the controversy was wholly between citizens of different states—the complainants, citizens of New York and Pennsylvania, and the petitioners defendants, citizens of Ohio—and that it was brought for the purpose of restraining and enjoining the petitioners. That although Warden and others were joined as defendants in the bill; they were only nominally parties, and that the controversy was capable of a final determination between the complainants and the petitioning defendants alone. It further set forth that the petition was filed before the term at which the cause could have been first legally tried, and that a bond had been filed with good and sufficient surety conditioned as required by law. The petition prayed that the court should proceed no further in the case, but should order its removal and certify the record to the Circuit Court of the United States, for the Western District of Pennsylvania.

The court (McJUNKIN, P. J.), after argument, filed an elaborate opinion, in which, after conceding that the application for removal was made in time, and that the bond offered was sufficient, he refused to order the removal of the cause, on the ground that from the record, which was the only legal evidence of the facts, it could not be discovered that the controversy was one that could be wholly decided and determined between the complainants and the petitioning defendants without the presence of the other defendants, and that, therefore, notwithstanding the difference of citizenship, the case did not come within the terms of federal legislation in regard to the removal of causes from the state courts, even of the Statute of 3d March 1875. (See 25 Pitts. L. J. 137.)

The petitioners, Rockefeller and Flagler, thereupon filed a certified copy of the record in this court. The complainants now move to remand the case to the Court of Common Pleas of Butler county.

George Shiras, Jr., *M. W. Acheson* and *John M. Miller*, for the motion.

Rufus P. Ranney, *McJunkin & Campbell*, *Hampton & Dalzell*, *Robert Woods* and *D. T. Watson*, contra.

The opinion of the court was delivered by

STRONG, J.—Three reasons are assigned in support of the motion

to remand this case to the state court. They are as follows: First, that the application to remove the case into this court was not made in time; secondly, that if the application was in time the record discloses that the state court, in the due and orderly exercise of its own jurisdiction, has adjudged that the record and petition did not exhibit a case proper for removal under the Acts of Congress, and has refused to part with its jurisdiction; and thirdly, that the record clearly shows this court can have no jurisdiction of the case.

Of the first reason little need be said. The Act of Congress of 3d March 1875, has greatly enlarged the jurisdiction of the Circuit Courts of the United States, and enlarged correspondingly the right of removal of civil suits from the state courts. The second section of the act enacts as follows: "That any suit of a civil nature, at law, or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state, claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined, as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit into the Circuit Court of the United States for the proper district."

The third section prescribes the time when such removal may be made, and the manner in which it may be effected. It enacts that either party, or any one or more of the plaintiffs or defendants entitled to remove the suit, may make and file in the suit in the state court a petition for the removal before or at the term at which the cause could be first tried, and before the trial thereof, together with a bond with surety, &c. It is then made the duty of the state court to accept the petition and bond, and proceed no further in the suit. The petition and bond must be filed "before or at the term at which

the cause could be first tried, and before the trial thereof." In this case the bill was brought to March term 1878, of the state court. It was filed on the 8th of February 1878; a motion was instantly made for a receiver, and the 20th of February was assigned for hearing the motion. On the 18th of February the defendants entered their appearance, and moved to postpone hearing of the motion for a receiver until the 27th. This motion the court denied, but postponed the hearing one day. On the 21st of February the defendants filed a joint answer under oath, denying most of the material averments of the bill, together with affidavits. On February 25th the court appointed a receiver, and on the 5th of March 1878, the petition for removal of the suit into this court was filed together with the required bond. They were filed before the first term of the Common Pleas, subsequent to filing the bill, commenced. This recital of the facts, as they appear by the record, without more, is sufficient to show that the application for removal was made in due time.

The second reason advanced for remanding the case is equally without merit. If a proper petition and bond were filed in due season, as we have seen they were, and if the petition and record exhibited a case which the petitioners had a right to remove, it was not in the power of the state court to deny the right by any judgment it could give. The Act of Congress declares that after the petition and bond are filed, the state court shall proceed no further in the suit. The petition is filed in the suit. It thus is made part of the record, and, by the act of filing, the suit is withdrawn from the jurisdiction of the state court. It may be admitted that when the petition, read in connection with the other parts of the record, does not show a case of which the Circuit Court has jurisdiction, the jurisdiction of the state court is not ousted. In such a case that court may proceed. It may, therefore, examine the petition and record, but its judgment upon the question whether a proper case appears for removal is not conclusive upon the Circuit Court. It is to be observed that no order of the state court for a removal is necessary; certainly none, since the act of 1875. Nor is any allowance required. The allowance is made by the statute. Hence when the petition and record exhibit a case for removal, coming within the statute, all jurisdiction of the state court terminates. It has even been said every subsequent exercise of jurisdiction by that court is "*coram non judice*," null and void. Such was the language

of the Supreme Court in *Gordon* v. *Longert*, 16 Pet. 97, and the declaration has been repeated in other courts. This would seem to follow from the fact that subsequent action by the state court is expressly prohibited by the Act of Congress. But whether the declaration was strictly accurate when it was made, or not; whether subsequent exercise of jurisdiction by the state court was not void, but merely erroneous, it is unimportant now to consider; for plainly since, by the Act of 1875, the power of removal and the jurisdiction of the federal court is made independent of any action or non-action of the state court upon the application. The 5th section of the act requires the Circuit Court to dismiss a suit which has been removed, or remand it whenever it shall appear to its satisfaction that it does not involve a dispute or controversy properly within the jurisdiction of the Circuit Court. A decision of the state court, therefore, that the cause sought to be removed is one of which the Circuit Court has jurisdiction, can have no effect. It cannot force jurisdiction upon the Circuit Court, nor can it deny jurisdiction to it And further the 7th section empowers the Circuit Court, to which any cause shall be removable under the act, to issue a writ of certiorari to the state court, commanding said court to make return of the record in any such cause, removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of the act for the removal of the same, and enforce said writ according to law. Surely it would be no sufficient return to such a writ that the state court had decided the case was not one which could be removed, or had decided that the Circuit Court had no jurisdiction. So also it may be inferred from another provision of the act that no action of the state court can prevent or hinder the removal. A severe penalty is imposed upon the clerk of the state court who shall refuse to any one or more of the parties applying to remove a cause, a copy of the record therein, after tender of the legal fees for such copy. The copy must be furnished for filing in the Circuit Court to any party applying for removal, without reference to any action the state court may have taken.

For these reasons we think the refusal of the Court of Common Pleas to allow the removal of the case into this court is immaterial.

The third reason urged in support of the motion to remand is the most important one. If it be true indeed that the case is one of which this court has no jurisdiction, it is our duty to remand it to the court from which it has been removed. Whether we have juris-

diction or not depends both upon the citizenship of the parties and the controversy involved. What the citizenship is must be determined from the bill filed by the plaintiffs; and to the bill with its exhibit, the answer and the petition for removal, alone, can we look for the controversy between the parties, so far as it bears upon our jurisdiction. Taylor, one of the plaintiffs, is a citizen of New York, and his co-plaintiffs are citizens of Pennsylvania. Rockefeller and Flagler, the petitioners for removal, are two of the defendants, and they are both citizens of Ohio. The other defendants sued with Rockefeller and Flagler, are citizens either of Pennsylvania or of New York. The petitioners are therefore citizens of a different state from those of which the plaintiffs are citizens, though some of the plaintiffs and some of the defendants are citizens of the same state, viz., Pennsylvania. Such being the citizenship, it may be admitted that, as the law was before the enactment of the Act of 1875, the petitioners would have had no right to remove the case into the Circuit Court, and that court would have had no jurisdiction, because each of the plaintiffs was not capable of suing each of the defendants in a federal court. So it was ruled in *Strawbridge* v. *Curtis*, 3 Cranch 267, when the 12th section of the Judiciary Act of 1789 was under consideration, and this has been the constant construction of that act. Similar rulings have been made with reference to the acts of 1866 and 1867; case of the *Sewing Machine Companies*, 18 Wall. 553; *Knapp* v. *Railroad Co.*, 20 Wall. 122. Such was the general rule. It was not, however, of universal application. Even in *Strawbridge v. Curtis*, the court declined giving an opinion of a case where several parties represent several distinct interests, and some of the parties are, and others are not competent to sue, or liable to be sued in the courts of the United States. And the rule has often been held not to apply to merely formal parties. Thus in *Wood* v. *Davis*, 18 How. 468, it was said by the Supreme Court: "It has been repeatedly decided by this court, that formal parties, or nominal parties, or parties without interest united with the real parties to the litigation, cannot oust the federal courts of jurisdiction, if the citizenship or character of the real parties be such as to confer it." The court has gone much farther. In *Shields* v. *Barrow*, 17 How. 139, speaking of parties to a bill in equity, they were described as—1st, formal parties; 2d, necessary parties; and 3d, "persons who not only have an interest in the controversy, but an interest of such a

nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." Such are indispensable parties. And subsequent decisions held that it is only when an indispensable party defendant was a citizen of the same state with the plaintiff that the jurisdiction of the federal courts was defeated. *Ober* v. *Gallagher*, 93 U. S. 204.

But, whatever may have been the doctrine held prior to the Act of Congress of 1875, that Act has introduced great changes of the law. The 1st section extends the jurisdiction of the Circuit Court nearly, if not quite as far as the 2d section of the 3d article of the constitution authorizes, alike in regard to the subject-matter of suits, and to the citizenship of the parties. It adopts the words of the constitution. The 2d section relates to the removal of suits from state courts into United States Circuit Courts, and it follows the language of the 1st section. Hence, any cause which might have been commenced in the Circuit Court, either because of its subject-matter or the citizenship of the parties, may be removed from a state court into the federal one. The question always is whether, on account of the citizenship of the parties or the subject of the controversy, the federal court has jurisdiction.

Whether since the Act of 1875, the right of removal extends to all cases in which some of the necessary or indispensable defendants are citizens of the same state with the plaintiffs or some of them is no doubt a very important question, not yet decided. It does not, if the rule of construction applied to the Judiciary Act of 1789, and the Acts of 1866 and 1867, is applicable to the later act. But the later act, for the first time, adopts the language of the constitution, and seems to have been intended to confer on the circuit courts all the jurisdiction which, under the constitution, it was in the power of Congress to bestow. Certainly the case mentioned would be a controversy between citizens of different states, and the reasons which induced the framers of the constitution to give jurisdiction to the federal courts of controversies between citizens of different states apply as strongly to it as they do to a case in which all the defendants are citizens of a state other than that in which the plaintiffs are citizens; and if that instrument is to be construed so as to carry out its intent, it would seem the question should be answered in the affirmative. However, that may be, it is certain

the Act of 1875 confers a right to remove cases which could not have been removed under any former act. It expressly declares that when in any suit mentioned in the second section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit into the Circuit Court. It is not where the controversy, or even the main controversy is between such citizens. The meaning of the clause is not obscure. In many suits there are numerous subjects of controversy, in some of which one or more of the defendants is actually interested, and other defendants are not. The right of removal is given where any one of those controversies is wholly between citizens of different states, and can be fully determined as between them, though there may be other defendants actually interested in other controversies embraced in the suit. The clause, "a controversy which can fully be determined as between them," read in connection with the other words, "actually interested in such controversy," implies that there may be other parties to the suit, and even necessary parties, who are not entitled to remove it. Such other parties must be indispensable to a determination of that controversy which is wholly between the citizens of different states, or their being parties to the action is no obstacle to a removal of the case into the Circuit Court.

If this is a correct construction of the Act of Congress, the case in hand is free from difficulty. The petition of Rockefeller and Flagler for removal, asserts that the controversy is wholly between them and the plaintiffs, and that as between them it can be fully determined. The motion to remand traverses no fact set out in the petition. It simply presents the question whether the facts asserted in the record show that under the Act of Congress the case was improperly removed, and that this court has no jurisdiction of it. The fifth section of the act provides that, if at any time it shall appear that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, that court shall proceed no further therein, but shall remand it to the court from which it was removed. Looking then to the bill and answer, do they involve such a controversy? We cannot doubt that they do.

The bill, with its exhibit, made a part of the bill, charges that the plaintiffs, together with one Vandergift, and one Foreman, sold

an undivided half interest in their oil producing properties to the defendants (not naming them), and entered into a partnership with the defendants (not naming them), having for its object the purchase and operation of oil producing territory, and the production and sale of crude petroleum. It further charges that, at the time of entering into the contract of partnership, a written contract was executed between certain trustees of the first part, the plaintiffs, and Vandergift and Foreman, of the second part, and Rockefeller and Flagler of the third part, confirmed by the other parties defendant, providing for the manner in which the title to the lands and property of the partnership should be acquired, held and disposed of, and fixing a limitation and method of dissolution of the partnership. A copy of this agreement is annexed to the bill, and made a part of it. From the whole tenor of the bill, it is evident that agreement is what is called the contract of partnership. But on reference to it, its purpose was not to create or evidence a partnership. It is a mere declaration of trust. The parties to it are Taylor and Bushnell, two trustees, of the first part, whose duty is to hold the lands conveyed to them, and to manage them, to operate, control and sell them for the sole and exclusive benefit of Taylor, Vandegrift, Foreman, Pitcairn and Satterfield, of the second part, and Rockefeller and Flagler, of the third part. There are no other parties to the agreement. The parties mentioned as of the third part are petitioners for the removal of the case. They are the only defendants named in the contract. The other defendants, it is true, appear to have joined in one of the conveyances of land conveyed to the trustees, and by a separate instrument they expressed assent to the agreement, and declared that their conveyance was made for the purpose set forth in it. But they entered into no covenants, and assumed no obligations to the plaintiffs. Looking more minutely to the contract, it appears that Taylor and Bushnell, the trustees, and parties of the first part, were constituted managers of the property and the interests of the trust, for a compensation to be fixed. All the other parties were at best mere *cestui que trustent*, and it was stipulated that in case profits were divided, they, together with all proceeds of sale, should be divided monthly, or oftener if the executive committee should so decide, and paid one-half to Taylor for the second party, and the other half to Henry M. Flagler for the third party. Beyond doubt, therefore, Rockefeller and Flagler are the main defendants in this

suit. There are no other indispensable defendants. If those who have not petitioned for a removal of the suit into this court have any interest at all in it, it is because Rockefeller and Flagler, the petitioners, are their trustees; a matter in which the plaintiffs have no interest. Conceding that those other defendants are *cestuis que trustent* of Rockefeller and Flagler, which does not clearly appear, they are not necessary parties to the bill. They are represented by their trustees: *Kerrison, Assignee*, v. *Stewart*, 93 U. S. R. 159. And the fact that they have been made parties by the plaintiffs is, under the Act of 1875, no obstacle to the removal of the case into the federal court: 2 Wood's Cir. C. Rep. 126; *Osgood* v. *Railroad Co.*, 6 Bis. 330; *Turner* v. *Railroad Co.*, Dillon on Removal of Causes 34, note. The case, therefore, plainly involves a controversy which is wholly between the plaintiffs and Rockefeller, and which can be fully determined as between them. If there are other controversies, in which the other defendants are interested, they are merely incidental; they are not the main controversy. The real controversy, as appears on the face of the bill, independent of the answer and the petition for removal, is between the plaintiffs and Rockefeller and Flagler, the second and third parties to the trust agreement. This is true whether the third parties are solely interested in one-half of the trust property, or whether they are trustees of the other defendants.

Indeed, according to the literal reading of the statute (a reading quite in harmony with the constitution), the right of removal, and the jurisdiction of this court exists, though the controversy between the plaintiffs and the defendants who are petitioners for the removal be not the main controversy in the case. It is enough if there be a controversy wholly between citizens of different states which can be fully determined as between them, though it may not be fully determined as between the plaintiffs and the other defendants. The phrase "as between them" is significant. And there is no necessary embarrassment attending such a removal. The entire suit is removed because of the controversy it involves between citizens of different states, and the Circuit Court, having thus obtained jurisdiction, is competent to determine all the controversies involved between the plaintiffs and the other defendants. The other questions are regarded as incidental. This is in accordance with the acknowledged practice, and with the adjudications. It has even been ruled that supplementary, auxiliary, or dependent proceedings,

though commenced by original bill, and involving only controversies between citizens of the same state, will be entertained in the federal courts, when necessary to a complete determination of all the matters growing out of the controversy in those courts, between citizens of different states. *Jones* v. *Andrews*, 10 Wall. 833, and cases in note.

But in this case it is unnecessary to invoke such decisions. The case, as exhibited by the bill of the plaintiffs, is one of property equitably held in common, to be managed and divided as stipulated in an agreement, and the object of the suit is to terminate the trust declared, and to have the property sold and divided according to the equities of the parties interested. The agreement itself provides how the division shall be made. Any rights to the profits, or proceeds of sale, not belonging to the second or third parties, that is not belonging to the plaintiffs, or Rockefeller and Flagler, are only incidental. The entire property described in the agreement, together with all rights to it, and all duties in relation to it, and all duties in relation to its management, belongs to the plaintiffs and Rockefeller and Flagler. If the other defendants have claims against the latter, they are outside of the real controversy, and claims in which the plaintiffs have no interest.

We think, therefore, the case was properly removed into this court, and the motion to remand it to the state court is denied.

McKENNAN, J., concurred.

Since the last edition of Judge DILLON'S pamphlet, on the Removal of Causes, appeared in 1877, several important decisions have been rendered, in cases that arose under the provisions of the Act of March 3d 1875. It is proposed to consider these cases, as well as the questions decided in the principal case, with reference, first, to the effect of the decisions of the state court on the removal of the cause; secondly, the effect of the Act of 3d March 1875 upon prior legislation; thirdly, the time within which the removal may be made; and finally, the parties to the removal.

I. It was held in the principal case, that the jurisdiction of the state court is not ousted, unless the record and petition show a case of which the United States court has jurisdiction; but the judgment of the state court to that effect is not binding upon the United States court; and if the latter court holds that the cause has been improperly removed, a contrary decision by the state court has no effect. The Court of Common Pleas No. 3, of Philadelphia county, in *Dunham* v. *Baird*, 1 W. N. C. 493, held that the cause could not be removed to the United States court, on account of the supposed want of proper citizenship of the parties. The cause was subsequently removed to the Circuit Court for the Eastern District of Pennsylvania, and a motion to remand was denied by the court, McKENNAN, J., holding that no action by

the state court was required by the Act of 3d March 1875, upon the petition or bond. It was for the United States courts to determine the sufficiency of the latter, when questioned. CADWALADER, J., concurred. The same court, in *McMurdy* v. *Life Ins. Co.*, 4 W. N. C. 18, held, in remanding the cause, that the plaintiff was not guilty of laches, in not opposing the removal before the state court, since that court had no longer jurisdiction, after the petition and bond were filed, to decide the right of removal, that being wholly within the jurisdiction of this court. And, again, in *Arthur's Adm'r* v. *N. E. M. Life Ins. Co.*, 6 W. N. C. 403, MCKENNAN, J., held that when the petition and bond were *rightly* filed, the jurisdiction of the state court *ipso facto* ceased, provided the removal is perfected by the filing of the copy of the record in the federal court. In *Ex parte Grimball*, 8 Cent. L. J. 151, the Supreme Court of Alabama held it to be the duty of the state court to examine the petition for removal, in order to ascertain whether the cause may be properly removed.

II. The only changes introduced by the part of the second section of the Act of 1875, which refers to a "controversy between citizens of different states," are, that either the plaintiff or defendant may remove the cause, and that it is no longer necessary that either party should be a citizen of the state in which the suit is brought; but it still remains necessary that the state citizenship of each individual plaintiff should be different from the state citizenship of each individual defendant, to authorize a removal under this section: *Petersen* v. *Chapman*, 13 Blatch. 395 (Circuit Court for the Northern District of New York). In *Warner* v. *The Railroad Co.*, 13 Blatchf. 231, the same court decided that, prior to the Act of 3d March 1875, a suit in a state court, which fell within the description of removable causes, might be removed, although it could not originally have been brought in the federal court; and this principle is not changed by the fifth section of the Act of 3d March 1875, which provides for the remanding or dismissal of causes, by the federal courts, not really or substantially involving a controversy within their jurisdiction. In *McMurdy* v. *Life Ins. Co.*, *supra*, the bond filed was conditional for the filing of a copy of the record of the proceedings in the state court upon the first day of the succeeding term of the Circuit Court, in the latter court, but did not provide, *as is required by the third section of the Act of* 1875, for the payment of costs, if the suit should be held, by the Circuit Court, to have been improperly removed. The court held this to be a fatal defect, and remanded the cause, *inter alia*, on the ground that the requirements as to the nature of the bond extended to all cases mentioned in the second section, and to that extent, at least, repealed all prior acts upon this subject. In *Cooke* v. *Ford et al.*, 16 Am. Law Reg. N. S. 417, it was held by the Circuit Court of Kentucky that the Act of 3d March 1875, does not entirely repeal § 639, Rev. Stat., relating to the removal of causes. The third subdivision of § 639, Rev. Stat., is not inconsistent with the Act of 1875, and is not repealed by it, and the court laid down the three following rules:—

1. No citizen of a state in which a suit is brought can remove it, except on petition filed, before or at the term, at which the cause could first be tried.

2. Where a suit is between citizens of different states, neither of whom is a citizen of the state in which the suit is brought, neither party can remove it, except on petition, before or at the term, at which the cause could first be tried; and

3. When the suit is between a citizen of the state in which it is brought and a citizen of another state, the latter may

remove it, by petition filed at any time before trial or final hearing, upon making an affidavit of prejudice or local influence, which will prevent a fair trial. The repeal of statutes is not favored, and will not be allowed by the court, unless the two are antagonistic and incapable of being reconciled. In the *New Jersey Zinc Co.* v. *Trotter*, 17 Am. Law Reg. N. S. 376, it was held by NIXON, J., in the District Court of New Jersey, that the second and third subdivisions of § 639, Rev. Stat., are not repealed by the Act of 1875. This was a suit brought in the state court by a corporation of New Jersey against three defendants, two being citizens of New Jersey, and one a resident of New York. The latter answered to the merits of the case, and removed the cause to the United States court. On motion to remand, it was held that the controversy could be determined without the presence of the other two defendants, and that the controversy as to them was removable under the second subdivision of § 639, Rev. Stat., and the motion was refused.

III. In *Huddy* v. *Havens*, 3 W. N. C. 432, Judge HARE held, in the Court of Common Pleas No. 2, of Philadelphia county, the "next term" under the Act of 3d March 1875, to be the next term at which the case could be *legally* tried, but not actually. If, owing to a crowded docket, the case could not be reached till the third term after it was at issue, a petition to remove it then is too late. This cause was removed to the Circuit Court for the Eastern District of Pennsylvania. The court remanded it, and held, following the decision of Judge HARE, and that of Judge DILLON, to the same effect, that the words "before" or "at" the term at which the cause could be first tried, meant the term at which the cause was first triable on its merits; and the court followed the record alone, and took no testimony on the subject. But what is the term at which the cause could be first tried? Does the language of the statute refer to the first term *during the whole of which the cause was triable*, or to the first term during any portion of which the cause was in that condition? Suppose the cause is put at issue on the last day of the state term, is either party precluded from removing the cause on account of the accidental shortness of time left for making and filing his petition and bond? This seems unreasonable, and the better view would appear to be that the term at which the cause could be first tried refers to a whole term of the state court, during which it is in the option of either party to remove the cause. In *Dunham* v. *Baird*, *supra*, the cause had been at issue and triable when the Act of 3d March 1875 was passed, nearly a year. There were four yearly terms in the state court in which the action was pending, the return-day of that term, during which the Act of Congress was passed, being the 1st of March. The next term began on the first Monday of June, and the petition was not filed till the twelfth of that month. It was argued that the time for removal had elapsed with the March term. As the cause was at issue prior to that term, that was the term at which the cause could be first tried. The removal should have been made during the March term (*i. e.*, during the months of March, April or May). But the state court, though refusing to assent to the removal, expressly negatived the argument. "The return-day," said LUDLOW, P. J., "of the March term was 1st March, a divided term is not judicially cognizable; the March term had passed in contemplation of law on 3d March," (the day on which the act was passed). So, on the same page, that judge said, "The act was only passed on 3d March 1875, during the term preceding this. This was, therefore, the first term succeeding the Act of Congress at which the cause could be tried."

And the same view was taken in this case by McKennan, Circuit Judge (2 W. N. C. 52). It will be remembered that the language of the act provides for the removal "*before or at the term at which the said cause could be first tried*, and before the trial thereof;" and it is difficult to see how this definition is fulfilled if predicated of a term which is one, not at which, but during only a part of which "said cause could be first tried." It would seem, therefore, both on reason and authority, that *the removal term is the term succeeding that during which the cause is put at issue.*

In *Gurnee* v. *City of Brunswick*, 1 Hughes 270, Waite, C. J., held that "the application to remove must be made at or before the first term at which the cause may be tried, *i. e.*, when the cause is ready for trial, although the court and parties may not be ready to try it." The same case further decided that, as an appeal from the board of supervisors, under the laws and practice in Virginia, to a county court, is triable *without pleadings* at the first term of the court after the appeal is taken, an application for removal must then be made at that term. The word "term" is a term occurring after the passage of this act: *Bank* v. *Wheeler*, 13 Blatch. 218; *Dunham* v. *Baird*, *supra*. A default taken on demurrer is a trial within the meaning of the act: *Bright* v. *Railroad Co.*, 1 Abb. N. Cas. 14. An application filed after the cause was called for trial, and the plaintiff was ready, but time was given the defendant to present an application for a continuance, was held to be too late for a removal: *Wait* v. *White*, 46 Tex. 338. It was further held in *Gurnee* v. *Brunswick City*, *supra*, that if the term occurs during the time a trial of the cause is stayed by an order of the state court, that is not such a term as is meant by the act. The court left undecided whether the third subdivision of § 639, Rev. Stat., allowing the removal of causes to the United States courts on the ground of prejudice or local influence, has been repealed by the Act of 3d March 1875. It was held by the Supreme Court of the United States in *Lowe* v. *Williams*, 4 Otto 650, that a suit pending in an appellate state court, after it has been prosecuted to final judgment in a court of original jurisdiction, cannot be removed to the Circuit Court of the United States. A case pending in the Supreme Court of the state at the time the Act of 3d March 1875 was passed, and which was sent back to the lower court for further proceedings, stands like a new cause, and the right of removal exists; the defendants are not bound to take any action with regard to the removal till the case has been redocketed by the plaintiff: *Pettilon* v. *Noble*, 7 Biss. 449 (Northern District of Illinois). In the principal case the petition for removal of a suit in equity was filed in the state court during the term in which the bill was filed, but subsequently to the filing of the answer and the appointment of a receiver by that court. The petition was held to be filed in time under the Act of 1875, requiring the filing to be made "before" or "at" the term at which the cause could be first tried, and before the trial thereof.

IV. In *Peterson* v. *Chapman*, *supra*, an action of trover was brought by citizens of New York against a citizen of New York and citizens of Connecticut in the state court. The defendants removed the cause. The cause was remanded on the ground that the controversy was not one between citizens of different states. For to entitle a party to a removal, it is necessary that the citizenship of each individual plaintiff be different from that of each individual defendant. This was considered to be still an open question in the principal case, and the above case was not referred to. The court held in *Carraher* v. *Brennan*, 7 Biss. 497 (in the Northern District of

Illinois), that a removal will only be allowed, when the controversy is so completely between citizens of different states, that its termination will settle the whole suit, and it is not enough that the citizens of different states are interested in the controversy, but they must have such an interest that, when the question as to them is settled, the suit is determined. The whole suit must be removed; a fragment cannot be, because a party interested in that fragment is a citizen of another state from that of the plaintiff. In *Hervey* v. *I. M. Railroad Co.*, 7 Biss. 103, it was also decided that a part of a controversy cannot be removed; and, further, that foreign citizens, where they do not constitute the entire plaintiff or defendant, cannot remove a suit, as the Act of 3d March 1875, only contemplates those suits which are between citizens of one of the states of the Union, on the one side, and citizens and subjects of foreign states, on the other: *Hervey* v. *Railroad Co.*, *supra*. A controversy between citizens of a territory, and between citizens of the District of Columbia and citizens of a state, is not a controversy between citizens of different states: *McMurdy* v. *Life Ins. Co.*, *supra*. The Common Pleas No. 3, of Philadelphia county, held that a case, where a citizen is sued in his own state court by a citizen of another state, is not within the language of the constitution providing for controversies between citizens of different states: *Dunham* v. *Baird*, 1 W. N. C. 493; but the cause was subsequently removed to the Circuit Court, and the removal was held by that court to have been a proper removal: 2 W. N. C. 52. In *Leutz* v. *Butterfield*, 52 How. Pr. 376, a citizen of New York sued a citizen of Massachusetts in the state court. The plaintiff was assignee of another citizen of Massachusetts, of the claim in dispute. An application to remove was denied by the Common Pleas of New York, but the court in banc held the cause to be removable, though the suit could not have originally been brought in the federal court. It was held in the principal case that the court, in the question of citizenship, will look to that of the trustee, and not that of the *cestui que trust*: also, that a suit may be removed, in which there are several controversies between citizens of different states, and of which one is wholly determinable as to them, and this is true, though others of the same party with petitioners for the removal, actually interested in other controversies embraced in the same suit, could not, on account of having the same citizenship with some of the other party, have themselves removed the suit; and also, that a controversy wholly between citizens of different states, fully determinable *as between themselves*, entitles either party to removal, though not fully determinable as between the remaining parties.

In *Gerardey* v. *Moore*, 4 American Law Times 387, Mr. Justice BRADLEY held, that the cause fell properly under the Act of 1866, but he expressed his opinion at considerable length to the effect that under the Act of 3d March 1875, all the individual plaintiffs need not have a different citizenship from all the individual defendants, and his honor said of the indispensable parties to the suit, "if some of the plaintiffs and defendants are citizens of the same state, the removal must be sought by *all* the defendants; one of the plaintiffs, or one of the several defendants cannot in this case remove the cause, but if all the plaintiffs on the one hand, and all the defendants on the other, are citizens of different states, then it does not require all the plaintiffs nor all the defendants to remove the cause, but any one of them may do so."

Mr. Justice MILLER, in *Board of Comm'rs* v. *Kansas Pacific Railroad Co.*, 5 Cent. L. J. 102, appeared to entertain the same opinion. That cause, however, he refused to remand on the ground

that the controversy, after removing the unnecessary parties to the suit, was wholly between citizens of different states.

In *Ex parte Grimball*, *supra*, the trustee of A. filed a bill in the state court against the brothers and sisters of A., her administrator and her husband. All the parties to the suit were citizens of Alabama except A.'s husband, who was a citizen of New York. A.'s husband filed a petition to remove the cause into the federal court. The Supreme Court of Alabama held, affirming the decree of the chancellor, and following the dicta of Justices MILLER and BRADLEY, that as none of the other defendants had joined A.'s husband in the petition for the removal, and as the controversy was not one "wholly between citizens of different states" the jurisdiction of the state court was not ousted, as the petition did not show a ground of removal under any act.

Besides the cases that have been considered under the four preceding categories, several others have been decided under the Act of 3d March 1875, which it is, perhaps, more proper to consider under separate heads.

PROCEEDING IN STATE COURT UNDER LOCAL STATUTE—TIME.—In *The Lehigh Coal and Navigation Co.* v. *Central Railroad of New Jersey*, 4 W. N. C. 187, the plaintiff had leased a road in Pennsylvania to the defendant in New Jersey. A bill was presented by the former to the chancellor of New Jersey, to the effect that the latter was insolvent, and praying for the appointment of a receiver of the road in Pennsylvania. The chancellor appointed a receiver, whose appointment was confirmed by the Circuit Court of Pennsylvania. The plaintiff removed the cause to the Circuit Court of Pennsylvania, and an application was made to enforce the plaintiff's rights in that court. On motion to remand, the latter court held, that the cause must be remanded because, first, the appointment of a receiver is in the nature of a final decree, and second, because the proceedings in the chancery of New Jersey are under a local statute, and the cause could not have been litigated in a federal court. But the decree of the chancellor can have no extra territorial jurisdiction, and the application for leave to enforce the plaintiff's rights with regard to the road in Pennsylvania, will be considered by this court, for the receiver is the servant of this court.

BOND AND PETITION.—The bond must be conditional for payment of costs by the parties removing the cause, in case the federal court should be of the opinion that the cause was improperly removed: *McMurdy* v. *Life Ins. Co.*, *supra*. A petition for the removal of a cause is insufficient unless it sets forth in due form, such as is required in good pleading, the essential facts not otherwise appearing in the case. This is a condition precedent to the removal of the cause, under the Act of Congress: *Gold-washing Co.* v. *Keys*, 6 Otto 199.

RECORD.—*Time of Filing—Who may file it.*—In *Osgood* v. *Chicago, &c., Railroad Co.*, 14 Am. Law Reg. N. S. 518, the court was doubtful as to what would be the effect of filing the record of the state court in the federal court, before the term next after filing the petition and bond in the state court, and whether the case would be in every respect before the federal court prior to its next term. In *Arthur's Adm'r* v. *N. E. M. Life Ins. Co.*, *supra*, it was held, that although it is optional with the party petitioning whether he file the copy of the record on or before the first day of the then next session of the Circuit Court, the other party may, if he please, file the copy himself, and in so doing is considered to have acted for the party petitioning, and this may be done at any time after the filing of the petition and bond in the state court.

WHEN ACTION OF STATE COURT IS RECOGNISED IN FEDERAL COURT.

—In *Williams Mower and Reaper* v. *Raynor*, 7 Biss. 245, in the Circuit Court for the Eastern District of Wisconsin, an order had been made in the state court to produce papers, &c. This order was disobeyed, and proceedings for contempt were instituted. The cause was subsequently removed to the federal court. It was there held that the latter court will recognise and enforce the order of the state court in the contempt proceedings; but if an appeal is taken to the superior court in the state, on the order, the circuit court will hold in abeyance the enforcement of the order till the appeal is disposed of; and the order for contempt will be enforced, if such proceedings were really in aid of the civil suit.

CONSTRUCTION OF THE CONSTITUTION OR AN ACT OF CONGRESS.—The court held in *Gold-washing Co.* v. *Keys*, *supra*, that a suit cannot be removed under the second section of the Act of 3d March 1875, simply because in its progress, a construction of the constitution or a law of the United States is necessary, unless this construction, in part at least, arises out of a controversy in regard to the effect and operation of some provision in that constitution or law on the facts involved in the case.

JURISDICTION.—It was held in the principal case that when a suit is removed in which there are several controversies, and one controversy is wholly between citizens of different states, and determinable as to them, the circuit court, upon such removal, obtains jurisdiction over the whole cause, the remaining controversies therein being treated as incidental to that which authorized the removal.

The Circuit Court for the Northern District of Illinois held that the 10th clause of § 628, Rev. Stat., giving the United States courts jurisdiction "of all suits by or against any banking association established in the district for which court is held, under any law providing for national banking associations" does not invest said courts with exclusive jurisdiction over this class of corporations, and if a suit is brought against such associations in a state court, the cause cannot be removed to the federal courts. The jurisdiction of the federal courts is only concurrent with that of the state courts: *Pettilon* v. *Noble*, *supra*.

The jurisdiction of the federal court may arise during the pendency of a suit in a state court by such a change in the parties to the suit as would have entitled a removal, if the cause had been originally between those parties. See *Healy* v. *Provost*, 6 W. N. C. 578.

ARTHUR BIDDLE.

Supreme Court of Wisconsin.

THE APPLETON IRON CO. ET. AL., RESPONDENTS, *v.* THE BRITISH AMERICA ASSURANCE CO., APPELLANT.

The mortgagee of chattels has the legal title to the property mortgaged, even before the debt is due, and he may take immediate possession of the property unless by express stipulation the mortgagor is permitted to retain possession.

Where, therefore, a person mortgaged chattels and insured the same, the loss, if any, to be paid to the mortgagees as their mortgage interest should appear, the policy containing a provision that if the property insured be sold or transferred, or if any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, then in every such case said dolicy shall be void, and the mortgagor was afterwards adjudicated a bankrupt